Supreme Court, U.S.
FILED
JUN 26 1995

No. 94-1946

IN THE

Supreme Court of the United States

October Term, 1994

SECRETARY OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,
Petitioner,

v.

IDELL S.,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE STATES OF FLORIDA, HAWAII AND VIRGINIA AS AMICI CURIAE IN SUPPORT OF THE PETITIONER*

ROBERT A. BUTTERWORTH
Attorney General of Florida

JASON VAIL
Assistant Attorney General
(Counsel of Record)

OFFICE OF THE ATTORNEY GENERAL
The Capitol, Suite PL-01
Tallahassee, FL 32399
(904) 488-2381

*The states joining in this brief are listed on the inside front cover

BEST AVAILABLE COPY

MARGORIE S. BRONSTER
ATTORNEY GENERAL OF HAWAII
425 Queen Street
Honolulu, Hawaii
(808) 586-1282

JAMES S. GILMORE III
ATTORNEY GENERAL OF VIRGINIA
900 East Main Street
Richmond, Virginia 23219
(804) 786-1427

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES ii

INTEREST OF THE AMICI CURIAE 1

REASONS FOR GRANTING THE WRIT 2

I. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT. 2

A. The impact on the states' mental health systems. 3

B. The circuit court's opinion unnecessarily violates principles of comity and federalism and constitutes a fundamentally alters the petitioner's program. 12

CONCLUSION 15

TABLE OF AUTHORITIES

Cases	*Page(s)*
Alexander v. Choate, 469 U.S. 287 (1985)	8, 14
Chiles v. Children A-F, 589 So.2d 260 (Fla. 1991)	12
Helen L. v. DiDario, 46 F.3d 325 (3d Cir. 1995)	2, 3, 12
Missouri v. Jenkins, 495 U.S. 33 (1990)	13
Oberti v. Board of Education, 995 F.2d 1204 (3d Cir. 1993)	11
Traynor v. Turner, 485 U.S. 535 (1988)	13
Southeastern Community College v. Davis, 442 U.S. 397 (1979)	14
Smith v. U.S., ___ U.S. ___, 113 S.Ct. 2050 (1993)	9

Statutes and regulations	
42 U.S.C. s. 1997	1
42 U.S.C. s. 12101(a)(1)	3
42 U.S.C. s. 12101(a)(2)	8
42 U.S.C. s. 12101(a)(3)	8
42 U.S.C. s. 12131	2, 9
42 U.S.C. s. 12131(2)	8
42 U.S.C. s. 12132	2, 9
42 U.S.C. s. 12181(7)	11
42 U.S.C. s. 12182(b)1)(B)	11
28 C.F.R. s. 35.130(d)	2, 10, 12
Fla. Stat. s. 394.467 (1993)	4

Other authorities ***Page***

Arrigo, *The Logic of Identity and the Politics of Justice,* 18 New Engl. J. on Cr. and Civi. Conf. 1 (1992) 2

Baker, Manderscheid, Hendershot, Jack, Schoenbron, Goldstrom, *Serious Mental Illness and Disability in the Adult Household Population: United States 1989,* Centers for Disease Control, U.S. Department of Health and Human Services, report no. 218, Sept. 16, 1992 4

Benson, *Deinstitutionalization and Family Caretaking of the Seriously Mentally Ill,* 17 Int. J. of L. and Psychiatry 119 (1994) 5, 7

Braddock, Hemp, Bachelder and Fujiura, *The State of the States in Developmental Disabilities,* American Association of Mental Retardation (4th ed. 1995) 4

Comments of Senator Metzenbaum, 135 Cong.Rec. S10797 (Sept. 7, 1989) 10

Cook, *The Americans with Disabilities Act: The Move to Integration,* 64 Temp. L.Rev. 393 (1991) 6

Deinstitutionalization, Mental Illness and Medications, Hearing before the Committee on Finance, United States Senate, May 10, 1994, S. Hrg. 103-1011 . . . . . 4, 5, 7

Kinney, Freedman, Cook, *Quality Improvement in Community-Based Long-Term Care: Theory and Reality,* 20 Am. J. L. & Med. 59 (1994) 3

LaFond, J., and Durham, M., *Back to the Asylum: The Future of Mental Health Law and Policy in the United States* (1992) 5, 6

Other authorities ***Page***

Lutterman, T., "The State Mental Health Agency Profile System," *Mental Health, United States 1994,* Substance Abuse and Mental Health Services, Public Health Service (1994) 5

Redick, Witkin, Atay, Manderscheid, "Highlights of Organized Mental Health Services in 1990 and Major National and State Trends," *Mental Health, United States 1994,* Substance Abuse and Mental Health Services, Public Health Service (1994) . . . 4

Ridgway and Zipple, *The Paradigm Shift in Residential Services: From the Linear Continuum to Supported Housing Approaches,* 13 Psychosocial Rehabilitation Journal 11 (1990) 5, 7

Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans,* 64 Temp. L.Rev. 375 (1991) 10

56 Fed.Reg. 35,703 (1991) 11

No. 94-1946

IN THE

Supreme Court of the United States

October Term, 1994

SECRETARY OF PUBLIC WELFARE OF THE COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

v.

IDELL S.,

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE AMICI CURIAE IN SUPPORT OF THE PETITIONER

THE INTEREST OF THE AMICI CURIAE

On May, 17, 1995, Assistant Attorney General Deval Patrick wrote Lawton Chiles, the Governor of Florida, to announce the U.S. Justice Department's intention to conduct an investigation of a Florida state mental hospital pursuant to its authority under the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. s. 1997.

The department intends to look at a variety of conditions at the hospital, including whether there has been a "failure

to provide services to residents in the least separate, most integrated setting."[1]

The State of Florida has no reason to doubt that the Justice Department will urge upon the district courts in Florida the same interpretation of the Americans with Disabilities Act (ADA), 42 U.S.C. ss. 12131 and 12132, and 28 C.F.R. s. 35.130(d) that it did in the present case.

Since the Justice Department acts under CRIPA throughout the country, all states now face exposure to the ADA interpretation found in *Helen L. v. DiDario*, 46 F.3d 325 (3d Cir. 1995). This means that the issue presented here will be re-litigated throughout the nation, imposing significant costs on the states, the federal government and the federal courts.

REASONS FOR GRANTING THE WRIT

I. THE PETITION PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW THAT SHOULD BE DECIDED BY THIS COURT.

The court of appeals' decision has broad implications not only for the manner in which services are provided to the physically disabled like Idell S., but to the disabled in all categories.

The opinion essentially requires states to reduce their waiting lists for services to zero. That is, when a disabled person resides in a setting deemed restrictive (as in a state

---

1 The terms "least restrictive alternative" or "integrated setting" are euphemisms for community-based treatment; that is, treatment for the problems of the disabled in settings outside institutions or large congregate facilities. Arrigo, *The Logic of Identity and the Politics of Justice*, 18 New Engl. J. On Cr. and Civil Conf. 1 (1992).

hospital or a nursing home) and she can function in a less restrictive setting with some help (like Idell S. at home), the states must fund that less restrictive placement.

The practical effect of this decision may be even broader, and is startling in its implications. For the court of appeals' decision could be read as a mandate to states to fully fund their community-based programs to meet the demand. Since the Justice Department acts under CRIPA on behalf of large classes of the disabled, this will be the practical outcome of *Helen L.*

With between 9-11 million Americans of all ages who are chronically disabled and require some help,[2] the cost will be more than the states can bear.

The fiscal impact on the states is impossible to estimate with precision. However, there is no doubt that it will be enormous. This impact is of sufficiently great importance to justify this court's review of the case.

A. The impact on the states' mental health systems.

Coming to grips with the cost to the states of the opinion below is beyond the scope of any mere legal brief. The range of disabilities is broad and the needs vary from person to person, and the costs vary from state to state and program to program.

However, it is helpful to study the effects of the circuit court's opinion on one area, such as mental health care.

---

2 Kinney, Freedman, Cook, *Quality Improvement in Community-Based Long-Term Care: Theory and Reality*, 20 Am. J. L & Med. 59 (1994).Congress concluded there were 43 million Americans with some kind of disability. 42 U.S.C. s. 12101(a)(1).

Nationwide, there are an estimated four-five million people with serious, debilitating mental illness.[3] More than 90,000 of the seriously mentally ill are treated in state and locally funded mental hospitals.[4] [5] The national cost of all mental health services in 1991 was estimated at $58 billion.[6] The states are estimated to carry one-third the cost of all mental health services.[7] State and local mental hospital costs alone were about $3.8 billion in 1990.[8] Florida's budget for community-based adult mental health care in fiscal year 1995-1996 is $155.7 million. The state has approximately 1,950 patients in six state mental hospitals at an annual cost of $248 million for fiscal year 1995-1996.[9]

The national trend since the late 1950s has been to reduce state hospital populations, and hospital populations

---

3 *Deinstitutionalization, Mental Illness and Medications*, Hearing before the Committee on Finance, United States Senate, May 10, 1994, S. Hrg. 103-1011 at 7; Baker, Manderscheid, Hendershot, Jack, Schoenbron, Goldstrom, *Serious Mental Illness and Disability in the Adult Household Population: United States 1989*, Centers for Disease Control, U.S. Department of Health and Human Services, report no. 218, Sept. 16, 1992, at 1.

4 Redick, Witkin, Atay and Manderscheid, "Highlights of Organized Mental Health Services in 1990 and Major National and State Trends," *Mental Health, United States 1994*, Substance Abuse and Mental Health Services, Public Health Service (1994) at 101.

5 By comparison, about 78,000 people with developmental disabilities nationally were institutionalized in 1992. Braddock, Hemp, Bachelder and Fujiura, *The State of the States in Developmental Disabilities*, American Association of Mental Retardation (4th ed. 1995) at 10.

6 Senate Hearing 103-1011, *supra* at note 3, at 65.

7 *Id.* at 14.

8 *Id.* at 52.

9 These people are seriously mentally ill. Most of them are involuntarily committed because they are a danger to themselves or others. See s. 394.467, Fla. Stat. (1993).

have fallen considerably since then.[10] Meanwhile, the states have expanded community-based programs, and every state affords some kind of community-based care outside state mental hospitals.[11] Each state structures its community-based mental health care system differently, but the systems fall into three general categories: a) states operating their systems directly (6); b) states contracting with nonprofit organizations that provide services (30); and c) states funding county and city health boards that operate community facilities (13).[12]

Despite a great increase in the size, number and quality of community-based programs, the general criticism of activists and many commentators is that the states haven't done enough to meet the need for community-based treatment. That is, they haven't spent enough money.[13]

State legislatures, however, must make tough choices when setting budget priorities. Resources are limited, needs are infinite, and consequently, the competition for funds is fierce. Because of the high cost, many states have shied away from providing all the services that evolving

---

10 Senate Hearing 103-1011, *supra* at note 3, at 1-2, remarks of Senator Moynihan; J. LaFond and M. Durham, *Back to the Asylum: The Future of Mental Health Law and Policy in the United States* (1992) at 12.

11 T. Lutterman, "The State Mental Health Agency Profile System," *Mental Health, United States 1994*, Substance Abuse and Mental Health Services, Public Health Service (1994), at 183.

12 *Id. See also* Ridgway and Zipple, *The Paradigm Shift in Residential Services: From the Linear Continuum to Supported Housing Approaches*, 13 Psychosocial Rehabilitation Journal 11 (1990).

13 Benson, *Deinstitutionalization and Family Caretaking of the Seriously Mentally Ill*, 17 Int. J. of L and Psychiatry 119 (1994) at 132.

professional judgment might think necessary to everyone who demands them.[14]

If Florida must provide care in less restrictive settings for those on waiting lists for services, we estimate an additional cost of $52.4 million for fiscal year 1995-1996.

But the court of appeals decision may require the states to go further. The case's strict holding was that a paralyzed woman living in a nursing home on a waiting list for services at home had a right under the ADA to those home-based services. But its implications are far more extensive. Assume, for example, that the respondent is disabled but not yet receiving services. When she applies for services, she finds she qualifies for services both at the nursing home and through Pennsylvania's home-based program. However, because the home-based program is full, her only choice is to enter the nursing home. While we would urge another reading of the court of appeals' decision, it might be seen to require the respondent's placement in the home-based services program. In this way, the court of appeals decision might be stretched to require the states to fully fund all services for the disabled for community-based mental health care, and could even be taken to require deinstitutionalization.[15]

Such an undertaking would seriously strain the resources of state governments. In Florida, we estimate the cost of

---

14 LaFond and Durham at 126. The authors have also pointed out that many courts "also realize[] that, in a world of limited financial resources, articulating and enforcing the rights of one group, such as institutionalized mental patients, usually meant less money spent on others not present or represented before the courts..." *Id.* at 14.

15 At least one advocate for the disabled has taken the view that the ADA requires the provision of a full-time attendant to enable a disabled person to live at home. *See* Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 Temp. L.Rev. 393, 429 (1991).

eliminating the waiting lists and meeting the full need for community-based mental health services to be an additional $163.5 million for the fiscal year 1995-1996.

Expanding community mental health care is generally thought to be a good thing, and in fact, providing for home-based care is the current mental health vogue.[16] However, there will always be a need for restrictive placements, and while expanding their community-based systems, the states are unlikely to close their mental hospitals or similar facilities.[17]

As officials of the executive branch, we cannot, of course, speak for what our state legislature will do if presented such a bill. However, many state legislatures believe they are funding services to the limit of their resources. Indeed, there may be enough reluctance to stop the trend toward the reduction of state hospital populations and the development of community-based care. The least one might expect is a one-size-fits-all type of service delivery, with services offered at only one kind of site, with one level of restrictiveness, and with the consequent stifling of the innovation so necessary to the evolution of mental health delivery systems. For the circuit court's opinion clearly portends that if a state creates a service for one disabled person, it must fund that service for all disabled people who qualify. If that is so, the states will not want to expose themselves to the limitless expense such a ruling will mean. In short, one of the corollaries to Murphy's Law — the law of unintended consequences — may produce results that the court of appeals and, certainly, Congress (in the circuit court's view) did not expect.

---

16 Benson, *supra*; Ridgway and Zipple, *supra*.

17 Senate Hearing 103-1011, at 100.

We seriously doubt that Congress intended to impose such costs on the states, as an unfunded mandate in disguise, without some express intention to do so. *See Alexander v. Choate*, 469 U.S. 287, 298-299 (1985).[18]

In its findings in the ADA, Congress made two passing references to segregation and institutionalization that the circuit court seized on as demonstrating an intention to require that treatment of the disabled take place in the most integrated setting. In 42 U.S.C. s. 12101(a)(2), Congress said that "historically, society has tended to isolate and segregate individuals with disabilities" and it referred to that as discrimination. In s. 12101(a)(3), Congress said "discrimination against individuals with disabilities persists in such areas as...institutionalization..."

Yet in Title II, Congress did not address the issue of deinstitutionalization or segregation in the context presented in this case: services available solely to the disabled for treatment. Section 12131(2) provides simply:

> (2) Qualified individual with a disability. — The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

---

18 "Had Congress intended s. 504 [of the Rehabilitation Act] to be a National Environmental Policy Act for the handicapped, requiring 'Handicapped Impact Statements' before any action was taken by a grantee that affected the handicapped, we would expect some indication of that purpose in the statute or its legislative history."

Section 12132 states:

Sec. 202. Discrimination.

> Subject to the provisions of this title, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity.

Thus on their face, the operative parts of the statute say nothing about "integration." They only provide that a disabled person shall not be "excluded from participation in or be denied the benefits of services" or "be subjected to discrimination." None of these words is specifically defined, and therefore they take their plain ordinary meaning. *Smith v. U.S.*, ___ U.S. ___, 113 S.Ct. 2050, 2054 (1993). That plain meaning — which is not ambiguous — expresses no Congressional intention about "integration" in the context presented by this case. The plain meaning addressed a wholly different issue — unequal or segregated access to services provided to the general public. Said another way, s. 12131 and 12132 require the states, when offering services to the general public, not to segregate or isolate the disabled but to serve them in the same setting as the nondisabled and not to deny the disabled access to public services because of their disability — in a word, equality of access.

This language, then, is not enough to put the states on notice that they will be required to provide services designed *solely* for the disabled, which are intended as *treatment* or to enable them to function, in a particular setting.

Nor does the legislative history suggest that interpretation. The legislative history makes clear that Congress' model was race and the elimination of separate-but-equal services.[19] So, if services are available to the nondisabled, they must be made available without discrimination to the disabled *in the same setting*. Separate but equal is forbidden. Only through heedless use of the word "integration" does one arrive at the conclusion that it means that treatment of the disabled must take place in an integrated or community setting.

At the time of the ADA's passage, it appears that the Justice Department's view of the ADA and "integration" was different from its view today. Then-Attorney General Richard Thornburgh said at the time that the ADA's purpose was to overcome barriers to services, mandating "true access for Americans with disabilities to mainstream society."[20] It is clear from the context that General Thornburgh's understanding was that the barrier was to services provided to the public generally. The department's explanation of 28 C.F.R. s. 35.130(d) at the time of its promulgation does not give any hint of the interpretation

---

19 See comments of Senator Metzenbaum: "Now, as we prepare to vote on the ADA, we face a decision. We're at a turning point. Do we want to extend civil rights protection to Americans with disabilities? Do we want to build on the great American promise of inclusion, and bring people with disabilities into the fold?

"Our failure to do so would be like turning back the clock. It would be tantamount to dredging up a 'whites only' sign and hanging it at a nearby lunchcounter." 135 Cong.Rec. S10797 (Sept. 7, 1989).

20 Thornburgh, *The Americans with Disabilities Act: What it Means to All Americans*, 64 Temp. L.Rev. 375, 377 (1991).

now placed on the regulation. See 56 Fed.Reg. 35,703 (1991).[21]

Congress knows very well how to impose an integration mandate on the states. *See, e.g., Oberti v. Board of Education,* 995 F. 2d 1204 (3d Cir. 1993) (Individuals with Disabilities Education Act requires mainstreaming of disabled children). And, in fact, Congress provided for an integration mandate in the ADA — but not one that affected states. In Title III, Congress required that services offered to the disabled by "public accommodations" be provided in an integrated setting.[22] Public accommodations, however, are defined as private entities, not public entities.[23] (And even in this instance, Congress' intention was to eliminate separate-but-equal services to the disabled.)

That Congress did not clearly provide for "mainstreaming" or "integration" of the disabled who receive special *public* services unique to them *because of their disability as treatment* provides strong evidence that Congress ultimately lacked the intention to impose the substantial cost of doing so on the states.

---

21 When the Justice Department talked about seclusion, segregation and integration, it did so in the context of providing the disabled with the same services provided the nondisabled: "Integration is fundamental to the purposes of the Americans with Disabilities Act. Provision of segregated accommodations and services relegates persons with disabilities to second-class status. *For example,* it would be a violation of this provision to require persons with disabilities *to eat in the back room* of a government cafeteria or to refuse to allow a person with a disability the *full use of recreation facilities* because of stereotypes about the person's ability to participate." (Emphasis added)

22 42 U.S.C. s. 12182(b)(1)(B): "Integrated settings. — Goods, services, facilities, privileges, advantages, and accommodations shall be afforded to an individual with a disability in the most integrated setting appropriate to the needs of the individual."

23 *Id.* s. 12181(7).

Thus, 28 C.F.R. s. 35.130(d) should be read in light of the congressional mandate to eliminate separate-but-equal services to the disabled — when those same services are provided to the nondisabled. The circuit court's interpretation of this regulation, giving it the force of law, *Helen L.*, 46 F.3d at 332, is unsupported by the clear language of the statute and the legislative history.

Thus, because of the substantial costs imposed on the states by the court below, the Justice Department's clear intention to project the lower court's opinion nationwide, and the lack of a clearly expressed congressional intention to impose a massive unfunded mandate on the states, this court should grant the writ.

B. The circuit court's opinion unnecessarily violates principles of comity and federalism and fundamentally alters the petitioner's program.

An issue of grave concern to the amici is the way the circuit court overrode state constitutional limitations on the spending of state money. Idell S. was on a waiting list for home-care services because there wasn't enough money appropriated to put her immediately in the program. *Helen L.*, 46 F.3d at 329. Pennsylvania constitutional law prohibited the petitioners, executive branch officials, from taking money appropriated for other purposes and spending it on the respondent's home-based care. Florida, like most states, has the same constitutional separation of powers limitations on the handling of public money. *See Chiles v. Children A-F,* 589 So.2d 260 (Fla. 1991).

Yet the circuit court brushed aside these limitations, *Helen L.*, 46 F.3d at 336-339, saying simply that Pennsylvania could not rely on its funding mechanism "to justify administering its attendant care program in a manner that

discriminates and then argue that it cannot comply with the ADA without fundamentally altering its program." *Id.* at 338.

The upshot of the court's opinion is that if a state chooses to create a program to benefit or to treat only the disabled, and it funds that program to a level allowing services only to one person, it is bound to expand that program without limit until all who meet its eligibility requirements are served. Admitting one disabled person means having to admit all. Thus, once a state chooses to create a treatment program, it will have no control over its cost or scope.

This holding poses a serious threat to the states' abilities to set fiscal priorities — a matter that lies at the heart of state sovereignty and the structure of the federal system. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33 (1990); *cf. Traynor* v. Turner, 485 U.S. 535, 549 (1988) (Congress is entitled to establish priorities for the allocation of the limited resources available for benefits).

Finally, we dispute the circuit court's view that no fundamental alteration of Pennsylvania's program was involved. State programs are not freestanding. They rest in a web, the structure of state government. A program's funding determines its size and its nature, including the scope of services to be provided and the manner in which they will be provided. It is not uncommon for state legislatures to issue broad mandates, such as to provide care for all who need it or to provide care in the least restrictive setting, and then fail to appropriate enough funds to serve all who need help. In fact, the level of appropriations signals a legislature's true intentions for a program. Thus, the funding mechanism is as much a part of the program as the services to be delivered. By trampling on the funding mechanism, the circuit court fundamentally changed the structure of Pennsylvania's program, its government, and the fabric of its polity.

Moreover, eligibility was implicitly conditioned on adequate funding. By ordering the petitioner to provide home-based services, the circuit court altered those implicit eligibility requirements.

Therefore, the circuit court's opinion had a profound effect: it expanded the program. True, it only expanded it by one person, but its legal conclusion left the door open to anyone who qualifies. Pennsylvania has lost the ability to set its own budget and to control its own costs.

Certainly, this constitutes a fundamental alteration in Pennsylvania's program as contemplated by *Southeastern Community College v. Davis*, 442 U.S. 397 (1979), and *Alexander v. Choate*, 469 U.S. 287 (1985).

CONCLUSION

For these reasons, we submit that the questions presented by this case are of national importance, and they should be resolved by this court. Therefore, we urge the court to grant the writ.

Respectfully Submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

JASON VAIL
Assistant Attorney General
Fla. Bar no. 298824
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
Building E, room 200
1317 Winewood Blvd.
Tallahassee, FL 32399
(904) 488-2381
(904) 922-3947 (FAX)